IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, *Plaintiff in Error,* *vs.* MRS. A. E. REED, as Administratrix of the Estate of J. E. REED, Deceased, *Defendant in Error.*	No. 2301.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA THIRD DIVISION.

Brief of Plaintiff in Error.

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Brief of Plaintiff in Error.

This cause comes here on a writ of error sued out by the defendant below, to reverse a judgment rendered against it in the court below for the sum of $20,340.00, in an action at law for the recovery of damages for the death of one, J. E. Reed, husband of plaintiff, alleged to have been caused by reason of the negligence of defendant. For convenience in this brief, the parties will be referred to as designated in the court below.

The complaint (R. pp. 2-3) alleges that plaintiff is the duly appointed, qualified and acting administratrix of the estate of J. E. Reed, deceased, and that she sues as such for the use and benefit of herself, as his surviving widow, and her two minor children. That the defendant is a corporation doing business as a common carrier by steam railway in the Territory of Alaska, and was engaged in such business and operating its line of railway from Cordova, Alaska, into the interior of said territory at all times mentioned in the complaint.

The complaint further alleges that about January 1, 1912, and for some time prior thereto, said J. E. Reed was employed by defendant as a locomotive engineer, driving its engines over the railroad, as he was directed by the defendant; that on said date the defendant had negligently

> "allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders, negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed over which cars and locomotives were to be operated, so as to render the same extremely hazardous to the said J. E. Reed, and

other employees of the defendant operating its said engines."

That on or about said date, said Reed, pursuant to the duties of his employment, was driving an engine over the railway, and by reason of "the unsafe and hazardous condition of said track, said engine was derailed" and he was killed. Said complaint also alleges that deceased was thirty-one (31) years of age, in good health, and earning $3,000.00 per annum; that he left him surviving the plaintiff, his widow, and two minor children, aged respectively, seven and two years, who were deprived of the support

"and care of a loving husband and father, and said children have been deprived of the education, training and nurture which only a father can give, and said plaintiff has been damaged in the sum of twenty-five thousand dollars."

The answer (R. pp. 26 and 27) denies any knowledge as to the appointment of plaintiff as such administratrix; but it admits the incorporation of defendant, and that it was a common carrier as alleged, and it denies all other allegations of the complaint. For affirmative defenses, defendant pleaded that if said Reed was killed, his death

was caused by and arose out of and from risks incidental to his employment and business, which he assumed; also that it was caused by his own negligence and the negligence of a fellow-servant and those working with him.

The affirmative defenses of the answer were denied by a reply filed by plaintiff; and the issues as defined by the complaint, answer and reply came on for trial before Honorable Peter D. Overfield, judge of said court, and a jury, on April 30, 1913. At the close of the testimony defendant moved the court for a directed verdict, which motion was denied, and an exception taken by defendant and allowed. A verdict was rendered for $20,000.00 in favor of plaintiff, but without any segregation as to the separate damage sustained by plaintiff as widow of deceased, and by his respective children. After the trial, defendant made a motion for judgment, notwithstanding the verdict, and a motion for a new trial, both of which motions were denied and defendant's exceptions thereto allowed.

There is practically no dispute as to the material facts in the case. It is alleged and admitted that at the time of the accident, defendant was a common carrier by steam railway in the Territory of Alaska, and there is no dispute that deceased

was in its employ at that time, as engineer of a rotary snow plow used upon its said railway line. This railway was then being operated between Cordova, on the southwestern coast of Alaska, and Chitina, about 130 miles toward the interior. During the winter months portions of this railway line were liable at any time to be blockaded by heavy snowfalls and slides. This was especially true of that portion of the road from Flag Point, Mile 26, to Tiekel (R. p. 24). The ordinary running time of trains from Cordova to Tiekel was about eight hours (R. pp. 151, 292-3; Defendant's Exhibit 2, R. p. 471), but at this time of the year, on account of weather conditions and snowslides, it was impossibel to tell when leaving Cordova how long the trip would take or what conditions of weather or snow would be encountered (R. pp. 67, 151, 292-3, 327).

About 12:45 o'clock P. M. on December 30, 1911 (R. p. 200) a rotary snow plow pushed by two steam locomotives, with caboose attached, left Cordova, ahead of a combined freight and passenger train, bound for Tiekel, which was the next terminal (R. pp. 148, 163, 209, 328), and about 101 miles from Cordova. The crew of this rotary on this trip consisted of Engineer Reed, who had supervision over,

charge of and was responsible for the rotary and those employed on it(R. pp. 192, 263-264, 274, 289-290, 301, 322-324); also witness Albright, who was fireman, and had been working under Reed for about three weeks, who instructed the fireman in his duties and as to the company's rules and regulations (R. pp. 263-4); also witness Holden, who was the pilot, and witness Taylor, who was watchman for the "Rotary Fleet" (R. p. 244).

The snow plow was sent ahead to clear the track of snow. At that time defendant had only two rotary snow plows, a large one known as "X2" and a small one known as "X1." The large rotary was taken out from Cordova at first on this trip. On account of the heavy snow encountered it took until about eight or nine o'clock that evening to reach Mile 52 (R. pp. 106, 162-3). At this point the rotary became disabled so it could not work (R. pp. 108, 178, 201, 254). Both the regular train and rotary train backed up to Mile 39, where there was a water tank (R. p. 110), arriving there about 9:35 o'clock that evening (R. p. 201), where they waited until the other rotary was sent out from Cordova. The small rotary arrived at Mile 39 at 3:30 o'clock the morning of December 31, 1911, and all then went to Mile 49, which was the only place the dis-

abled rotary could be turned around to be sent back to Cordova (R. p. 111). Here the small rotary was turned over to the crew of the large rotary and placed in the rotary train, while the crew which had brought the small rotary out from Cordova took the disabled one back (R. p. 112).

The rotary train then proceeded ahead of the regular train toward their destination at Tiekel (R. p. 207). They passed bridge 75-A and stopped about half a mile or so beyond this bridge on account of a heavy snow drift encountered (R. pp. 113, 171, 183). It was here found that the rotary required water, and after ineffectual attempts were made to take water for it from the other engines, it was decided to back down to bridge 75-A and there syphon water from the stream. This was done, the regular train and rotary train all backing to this bridge, which they reached between 9 and 11 o'clock the evening of December 31 (R. pp. 113, 164, 171, 213).

This bridge was about ten feet from the ice of the stream below, and about the length of the rotary and two pusher engines. The regular train, therefore, was compelled to back clear across the bridge. The bridge was constructed on standard piling, five piles to the bent, across the pile bents were four-

teen-inch caps, and on top of these caps there were three eighteen by eight stringers on each side, set on edge, with a four-inch space between each stringer. These stringers ran lengthwise of the bridge. On top of the stringers were the ties with a five-inch space between, and the rails rested on these ties (R. pp. 270, 308, 311). The rotary train stopped on the bridge, the rotary stopping near the north end and the last engine stopping just off the other end (R. pp. 184, 194). The engine next the rotary stopped on the bridge. They remained here about an hour and a half, syphoning water into the rotary (R. p. 257).

While on the bridge, Fireman Albright of the rotary, cleaned out the ash pan of the rotary on the timbers of the bridge (R. pp. 259, 265, 266). Before doing this, Albright told Engineer Reed that he was going to clean out the pan (R. pp. 267, 268), and after he had cleaned it out he told Reed that he had done so, and Reed said: "Are you sure that the ashes are all off the bridge?" (R. pp. 260, 269), and Albright said they were. No ashes from the other engines were cleaned here (R. pp. 185, 221).

The rules of the company, then in force, provided as follows:

"To all Engineers, Firemen, Hostlers and All Concerned:

"Do not fail to extinguish all fire in ashes removed from ash pans.

"No excuse will be taken for the burning of ties, or other damage to property, as a result of a failure to do this. Engineers will be held equally responsible with their firemen in this matter." (R. pp. 195, 301.)

These rules were in the dispatcher's office at Cordova, in the bulletin books of the Company, referred to in the Company's time table (Defendant's Exhibit 2; R. pp. 195, 301), and were known to, or should have been known to Reed, who was an experienced engineer, and had been working as such on this railway for about two years (R. pp. 138, 288, 299).

After taking water and cleaning the ash pan, the rotary train backed across the bridge and took on some coal, which the regular train had unloaded for it on the snow alongside the track, and then both trains proceeded north toward Tiekel, where they arrived at 5:45 the morning of January 1, 1912 (R. pp. 209, 210). Here, the watchman, Taylor, and Fireman Scott and Conductor Wilson took

the train to Mile 105 for water, turned it and tied it up, the crew all going to bed shortly after their arrival at Tiekel (R. pp. 165, 211, 227, 229).

The great length of time consumed on this trip was caused by the great quantity of snow encountered, except the delay waiting for the second rotary to come out from Cordova and the delays in taking water. On account of the liability of the trains becoming storm-bound if they tied up at any point between Cordova and Tiekel, the next terminal, it was necessary that the trains keep moving as much as possible until they got through (R. pp. 67, 68, 88). There were no stations between these two terminals where it would have been safe or practicable to have tied up these trains with all their employees and passengers aboard.

At Tiekel these trains met a train which came down from Chitina with passengers for Cordova, and the crews of the rotary train and regular train were called at 1 o'clock P. M. on January 1st, and both trains then left with their passengers on the return trip to Cordova, the rotary ahead (R. p. 201). The trains proceeded slowly, about seven to nine miles an hour (R. p. 97), and when they reached bridge 75-A, about 7:30 o'clock that evening, the rotary which was ahead suddenly lurched to the

right, and went off the bridge, killing Engineer Reed.

An examination of the bridge after the accident showed that it had been burned (R. pp. 64, 79, 101, 203, 308-317). The cords or stringers on both sides of the bridge were burned. The fire had run along on the inside of the stringers on both sides of the bridge, but on the left-hand side, the way the rotary was going when it went over, the fire had not burned the stringers out as far as it had on the other side. On the side the rotary went over two piles were burned off at the bottom flush with the ice, and there were a pile of coal, cinders and ashes left around these two piles, which showed that the ashes cleaned from the pan of the rotary had fallen around these piles. The fire on this side had burned the stringers about sixteen feet back, and thirty-five or forty feet ahead of these piles, and they were almost destroyed.

We do not think it will be questioned that the bridge was burned from the ashes from the rotary, which Fireman Albright cleaned on the bridge. No other ashes were dumped on the bridge. No other trains had crossed the bridge since these ashes were dumped there, except these two trains going up after the rotary was watered and coaled, and there

is no evidence that any fire was dropped on the bridge by any of these engines. While it may be argued that coals from these engines might have been dropped on the bridge when the trains went north after the rotary was watered, there is not a particle of evidence of that fact, nor any evidence or claim that there was any defect in the ash pans of any of these engines, which would permit ashes to drop therefrom. It may be argued that the ashes were dumped from the rotary on the opposite side of the bridge from where the principal burn was, and the rotary went off. But the uncontradicted evidence is that both sides of the bridge were burned, and that the wind was blowing from the side of the bridge where the ashes were dumped toward the other side (R. pp. 141, 313, 314), and that the pile of coals, cinders and ashes from the engine was around the piles on the other side where they had been pushed off the bridge by the fireman. The ashes were raked out of the ash pan of the rotary onto the bridge, over the right-hand rail, as the rotary then stood; and, while the fireman testified that he pushed the ashes and coals off the bridge, he admitted that he did not turn any water on them, and that it was dark, and, of course, he could not tell whether or not there were any live coals among the ashes, or whether or not they fell around the piles

of the bridge, or whether any of them remained on any of the timbers of the bridge. We think, therefore, the court will be satisfied from a reading of the evidence, that the coals dumped from this rotary by the fireman, with the knowledge of the deceased engineer, set fire to the bridge and caused the accident.

It is alleged in the complaint that the ties were "burned and destroyed by ashes and cinders, negligently allowed by the defendant to be *dumped* upon the roadbed." It was also alleged that the defendant suffered its roadbed otherwise to become unsafe and unfit for the operation of locomotives over it, but there is no evidence that the roadbed was unsafe in any particular except from the fact of its being burned from these ashes.

Over the objections of defendant (R. pp. 59, 86, 87) the court permitted plaintiff to offer evidence that the Federal Act relating to the hours of service of railroad employees had been violated, and it charged the jury in effect that if they found defendant had violated this law, it would be liable. No allegation of negligence in this respect was contained in the pleadings, and we shall argue that this evidence was inadmissible under the pleadings, and that in any event the evidence does now show a

violation of that law, nor that the length of time deceased, or Fireman Albright, or any of defendant's employees had been working prior to the accident, in any way contributed thereto.

The questions involved in this Statement of Facts, and presented here by the Assignment of Errors, together with the manner in which these questions are raised on the record, are as follows:

I.

Defendant will contend that no negligence is shown, either as alleged or otherwise, and therefore there could be no recovery in this case.

This question is raised upon the record by Assignment of Errors Nos. 24, 26, 27, 29, 38, 39, 40, 41, 42, 47, 50 and 51.

II.

That deceased assumed all the risks of injury from the bridge burning on account of ashes coal and cinders dumped thereon by the fireman under his control, and for whose actions he was responsible, and therefore there could be no recovery in this case.

This question will be raised upon the record by

Assignment of Errors Nos. 24, 26, 35 to 46, inclusive, 48 to 51, inclusive.

III.

That the negligent acts of deceased in permitting his fireman to dump the ashes, cinders and coal from the rotary upon the bridge, and in not putting out all fire in such ashes, coal and cinders, as required by the rules of the Company, was the sole, proximate cause of the accident, and therefore no recovery could be had in this case.

This question will be raised upon the record by Assignment of Errors Nos. 24, 27, 29, 30, 32, 34 to 42, inclusive, 44, 45, 48, 49 50 and 51.

IV.

That the trial court committed prejudicial error in receiving evidence, over defendant's objection, of a violation of the hours of service law, and in instructing the jury that they might find negligence on the part of the defendant under the pleadings and evidence because of a violation of that law.

This question will be raised upon the record by Assignment of Errors Nos. 8, 12, 13, 14, 15, 19, 26, 31, 32 and 34.

V.

That the trial court committed prejudicial error in instructing the jury that they might find negligence on the part of the defendant under the pleadings and evidence if it failed to provide a track walker or inspect the track in question.

This question will be raised upon the record by Assignment of Errors Nos. 25, 26, 27 and 33.

VI.

That the trial court committed prejudicial error in its instruction to the jury as to the measure of damages in this case, and as to what they might take into consideration in determining such damage.

This question will be raised upon the record by Assignment of Errors No. 28.

VII.

That the verdict should have found the separate damage of plaintiff as widow of deceased, and of each of the children of deceased, instead of one lump sum for all, and therefore, the judgment based thereon cannot stand.

This question will be raised upon the record by Assignment of Errors No. 51.

VIII.

That the verdict is excessive, and was given and rendered under the influence of passion and prejudice, and is against the law and the evidence.

This question will be raised upon the record by Assignment of Error No. 51.

Specifications of Errors Relied Upon.

8.

The court erred in permitting witness Henry Lee to testify relative to train crews and rotary crews being continuously on duty since leaving Cordova and overruling of exception of plaintiff in error, which was duly excepted to and exception allowed, which testimony was as follows:

> "Q. Mr. Cobb: Now, tell the jury whether or not the train crews, the crew you have mentioned on the rotary and pusher engines, had been continuously on duty since they left Cordova?"
>
> "A. Yes, sir."

MR. BORYER: "I object to that—make the same objection."

Objection overruled. Defendant allowed an exception.

MR. COBB: "This is preliminary and I think it is something new."

"Q. Were you out on the trip of the 28th?"

MR. BORYER: "We object to that for the reason that it is incompetent, irrelevant and immaterial and tends to prove nothing under the issues."

Objection overruled. Defendant allowed an exception.

"A. Yes, I left Cordova on the 28th."

"Q. How long were you out on that trip?"

"A. The time shows 24 hours between Cordova and Mile 39."

"Q. Now, wasn't that the trip—I am not sure but I want to get at it—that the rotary was broken?"

"A. No, this was another rotary that was broken."

"Q. Was there a rotary broken on that trip?"

"A. There was a rotary broken on this trip also."

"Q. On the trip of the 28th?"

"A. I think so, yes."

"Q. Where did the little rotary come from that was sent up to relieve the one that was broken at Mile 39 or 53 on the trip of the 30th?"

"A. A little rotary came from Cordova."

"Q. It was sent out from Cordova?"

"A. Yes, sir."

"Q. When you reached Tiekel, how many hours had you been continuously on duty up to the time that you went off duty—how many continuous hours on that trip going up?"

Mr. Boryer: "We object to that as incompetent and irrelevant and tends to prove nothing under the issues."

Objection overruled. Defendant allowed an exception.

12.

The court erred in permitting witness Henry Lee, over the objections and exceptions of plaintiff in error duly allowed, to testify regarding running time on trip of December 28th and the number of hours continuously on duty, duly excepted to and exceptions allowed, which testimony is as follows:

"Q. MR. CORR: Coming back to the beginning of this trip—were you on the trip on which this train left here on the 28th of December, 1911?"

MR. BORYER: "We object to that as incompetent and irrelevant and tends to prove nothing under the issues and simply burdens the record."

By the COURT: "It has already been testified to. Unless it is something different than he has already testified to, the objection will be sustained. I let you go back to the 25th."

13.

The court erred in sustaining defendant in error exception to questions asked witness Henry Lee regarding objection to hours worked, to which

exception was taken and allowed, which questions were as follows:

"Q. Mr. Boryer: Did you raise any objection to going, to taking that trip out that morning?"

Mr. Cobb: "We object to that as irrelevant and immaterial."

Objection sustained. Defendant allowed an exception.

14.

The court erred in sustaining defendant's in error objection to witness Henry Lee testifying regarding work, which was duly excepted to and allowed, and which question was as follows:

"Q. Mr. Boryer: I will ask you if you have ever worked over the required time as provided by law, and the service hour law, since September 1, 1912?"

Mr. Cobb: "Same objection."

Objection sustained. Defendant allowed an exception.

19.

The court erred in refusing to permit plaintiff in error to show that the crew on the northbound train proceeded north from Miles Glacier or the halfway point between the two terminals—Cordova and Tiekel—willingly with the rotary that was working rather than attempt to return to Cordova with the broken rotary, to which refusal plaintiff in error excepted and exception allowed, which offered testimony was as follows:

"Q. Mr. Boryer: Now, when X1 met you at Miles Glacier was there any of the crew that wanted to come back home that you know of?"

Mr. Cobb: "We object to that as irrelevant and immaterial."

"Q. Did any of them raise any protest as to going any further?"

Mr. Cobb: "We object as irrelevant and immaterial."

Objection sustained. Defendant allowed an exception.

"Q. I will ask you if they did not proceed willingly, northbound?"

Same objection.

By the COURT: "I consider it makes no difference under the law whether the employees wanted to work or not."

Defendant allowed an exception.

24.

The court erred in denying motion of plaintiff in error for directed verdict, for the reason that the evidence of plaintiff shows that the plaintiff Reed was killed by reason of the burning of bridge 75A, that this bridge was burned by reason of the pan of the rotary being dumped on this bridge, that Reed was in charge of the rotary and the fireman who cleaned this pan on the bridge saw him clean the pan on the bridge, knew it was dangerous and against all rules and orders to clean pans on the bridges, and having cleaned and known that the rotary pan was cleaned on the bridge, violated the further rule of failing to see to or extinguish his fires dumped on the bridge, which rule was made for the safety of employees and passengers—to which *ruling duly* excepted and exception was allowed.

25.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"Was the cause of the death of Reed due to a negligence on the part of the defendant company in some duty reasonably imposed upon it, to be exercised by it in maintaining proper inspection of its road and roadbed, bridges and track and for which duty the defendant company is liable."

26.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to or for the death of any of its employees, that such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

27.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"It is the duty of a railroad company to keep and maintain its track, roadbed and ways in a reasonably good and safe condition for the operation of its engines and trains over the same, and to exercise such care in that respect as not to unnecessarily endanger the lives of its employees operating its train and engines over such road; and a failure of the railroad company to exercise reasonable and ordinary care in that respect is negligence which will render the company liable for all damages to an employee, or if killed, to his personal representative, for injuries resulting from such negligence. This duty to keep and maintain its roadbed, track and ways in safe condition is not satisfied merely by constructing it safe to begin with, but it is the duty of the company to have the track and ways watched and inspected at sufficiently reasonable intervals as to discover and repair or guard against defects aris-

ing from the operation of the road which would endanger the lives and persons of its employees operating its trains and engines over the same, and a failure to exercise ordinary care in that respect is negligence. If you find and believe from the evidence in this case that J. E. Reed was in the employ of the defendant as an engineer on or about January 1st, 1912, and that while so employed the engine upon which he was at work was derailed and he was killed, and that the accident in which he was killed was caused by the negligence of the defendant in failing to keep its roadbed, track or ways in a reasonably safe condition, then your verdict should be for the plaintiff."

28.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"If you find for the plaintiff under the instructions given you, you will determine the amount of your verdict. In arriving at this amount you will assess the damage at such sum as will compensate the plaintiff and her minor

children for their pecuniary loss resulting from the death of the husband and father. In estimating this loss it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that capacity with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family—and thus determine the value of the life. From this amount deduct the personal expenses of the deceased, and the balance, reduced to its present value, would be the present amount of your verdict, provided that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority."

29.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that the defendant company is a common carrier by railroad; that as such it is liable in damages to the plaintiff and her two children for the death of J. E. Reed if such death you find resulted in whole or in part from the negligence of any of the defendant's officers, agents or employees, or by reason of any defect due to the said defendant company's negligence in its roadbed, bridge or ties or track at point of bridge 75A on said defendant company's railroad on January 1, 1911."

30.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are further instructed that the defendant company would be none the less liable under the foregoing instruction if you find that the said J. E. Reed may have been guilty of contributory negligence in causing the condition at Mile 75 which resulted in his death, but you are further instructed in this connection that if you should find that the negligence of J. E.

Reed contributed to the cause of his death, the damages, if any, resulting should be diminished in proportion to the amount of negligence attributable to the said J. E. Reed in causing his death."

31.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that the act of March 4, 1907, passed by the Congress of the United States and applicable to the defendant company, its officers, agents and employees engaged in the transportation of passengers or property by railroad in the Territory of Alaska, provides that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until

he has had at least ten consecutive hours off duty and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having at least eight consecutive hours off duty, provided that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employee at the time said employee left a terminal and which could not have been foreseen, and provided further that the provisions of this act shall not apply to the crews of wrecking or relief trains. You are further instructed that this act became effective and in full force and effect on March 4, 1908."

32.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are further instructed that if at the time of the death of J. E. Reed the defendant

company was guilty of violating the statute of the United States providing that employees of its railroad should not be employed in any one day of twenty-four hours more than sixteen consecutive hours, without providing a rest of eight hours, and you further find the breach of this law by defendant in any way contributed to the injury and death of Reed, and then if you further find under the last above hereinbefore instruction that the said J. E. Reed was guilty of contributory negligence with the defendant company in causing his death, then the said contributory negligence of the said J. E. Reed, if any, should not be considered by you in assessing the damages, if any, against the defendant company in favor of the plaintiff and her children herein."

33.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that if you find the deceased was guilty of contributing by his negligent acts in dumping or knowingly permitting

his fireman to dump and leave unextinguished cinders and ashes from his rotary on the bridge in question, and that this caused the death of J. E. Reed, yet if you further find that the defendant company was subsequently and before the time the rotary fell through the said bridge on January 1, 1912, negligent in not providing through its proper agents and employees the presence of a track walker to inspect the said road at the point in question, at bridge 75A, and you further find that such track walker was not so engaged by said defendant company and the presence of such track walker would naturally have discovered the condition of the bridge in time to have prevented the accident on Janury 1, 1912, then the said defendant is liable and your verdict must be for the plaintiff."

34.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that if you find the defendant company was in no way negligent in

its duties to its employees and to the deceased, and the injury to the said deceased occurred alone by reason of deceased's own negligence or the negligence of his fellow-servants, then your verdict must be for the defendant, unless you further find that the defendant was guilty of a violation of the labor hour laws as hereinbefore set out and such violation contributed to the injury of the deceased."

35.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the rules of the Copper River & Northwestern Railway Company required the deceased to extinguish all fire in ashes removed from ash pans of his engines or rotary and the fire removed from the engine or rotary was not extinguished and this fire was the cause of the roadbed being out of repair and the ties burned and destroyed by reason of same having been dumped upon the roadbed at the point or place where the deceased

was injured, then you are instructed that the deceased assumed the risks of not seeing that the fire was out and cannot recover in this case."

36.

The court erred in refusing to give to the jury the following instruction required by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the Copper River & Northwestern Railway Company's roadbed was out of repair, the ties burned and destroyed by ashes and cinders by being dumped upon the roadbed and said deceased knew that ashes and cinders had negligently been allowed to be dumped upon the roadbed, which ashes and cinders caused the ties to be burned and destroyed by ashes and the roadbed made unsafe, you are instructed that the plaintiff cannot recover in this case."

37.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in

error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that it was the duty of the deceased in this case to obey all rules and regulations of the Copper River & Northwestern Railway Company and that if the deceased failed, neglected or refused to obey said rules and his injury was caused by reason of the deceased failing, neglecting or refusing to obey said rules, the deceased was guilty of contributory negligence."

38.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased, J. E. Reed, was engineer of the rotary and as such engineer, he has charge of the rotary, and as such engineer he is responsible for the conduct and acts of the fireman and from the evidence you find that the

fireman of the rotary dumped or cleaned the pan of the rotary on the bridge and that this was the cause of the unsafe condition of the roadbed, then you are instructed that the deceased cannot recover in this action."

39.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that it was the duty of the deceased to know the contents of the time table in use on the road at the time of the accident to him and a time table was in use and that said time table contained certain special rules, one of which stated where the bulletin books are located, and it was the duty of the deceased to examine the bulletin books and said bulletin books were accessible and contained a bulletin that required the deceased to extinguish all fire in ashes removed from ash pans, and you find that deceased failed to extinguish all fire removed from the ash pan of his rotary and that his failure

to extinguish or see that it was extinguished caused the bridge to burn and make the roadbed unsafe and this was the cause of J. E. Reed's death, then you are instructed that the deceased was guilty of negligence for which the defendant, Copper River & Northwestern Railway Company, cannot be held liable."

40.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence."

41.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence and cannot recover in this action."

42.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased as engineer of the rotary is responsible for the acts of the fireman and the fireman of his rotary cleaned the pan of the rotary on the bridge and it was dangerous to clean the pan on the bridge and the bridge was made unsafe by reason of the pan having been cleaned thereon and the deceased met his death by reason of the unsafe condition of the bridge caused by the pan being cleaned thereon, then you are instructed that the deceased was guilty of negligence and cannot recover in this action."

43.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased knew that the fireman on the rotary cleaned his pan on the bridge, which was made unsafe by reason of the

fireman cleaning his pan on the bridge and the deceased met his death by reason of the fireman cleaning his pan on the bridge and failing to extinguish all fire from the ashes of the pan cleaned on the bridge, then you are instructed that the deceased assumed all of the risks and hazards arising from or by reason of the pan being cleaned on the bridge."

44.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased had charge of the rotary and had supervision over the fireman and is responsible for the acts of the fireman in connection with the fireman's work around and upon the rotary, and you further find that the fireman of the rotary cleaned his pan on the bridge and by reason of having cleaned the pan on the bridge, the bridge was made unsafe and the deceased met his death by reason of the unsafe condition of the bridge, then you are in-

structed that deceased cannot recover in this action."

45.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased was in charge of the rotary and as such had supervision over the fireman and that it was the deceased's duty to see that the fireman extinguished all fire in ashes removed from the ash pan on the rotary and the deceased failed or neglected to do this, and by reason of the deceased's failure to see that the fireman extinguished all fire and he met his death by reason of failure to see that the fireman extinguished all fire, then you are instructed that the deceased was guilty of negligence and plaintiff cannot recover in this action."

46.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in

error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased's injury was caused by reason of negligence of the fireman of a fellow-servant of the deceased, that he cannot recover in this action."

47.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that the burden is upon the plaintiff to establish her cause of action by a preponderance of evidence and cannot recover unless she proves by the preponderance of evidence not only that the defendant, Copper River & Northwestern Railway Company, was negligent, but must also prove that the defendant's negligence contributed to the cause of the injury to the deceased and if she fails to establish these facts by the preponder-

ance of the evidence, the plaintiff cannot recover."

48.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that it was the duty of the deceased, J. E. Reed, to be conversant with the rules of the Copper River & Northwestern Railway Company pertaining to the running and operating of the rotary, including rules regarding the extinguishing of fire from the ash pan of his rotary."

49.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased, J. E. Reed, disobeyed any rule of the Copper River & North-

western Railway Company and he was injured or killed by reason of his disobeying said rule or rules, you are instructed that the plaintiff cannot recover in this action."

50.

The court erred in denying the motion of plaintiff in error for judgment in this case in its favor and against said plaintiff, notwithstanding the verdict rendered in said cause, to which plaintiff in error excepted and its exception was allowed.

51.

The court erred in denying the motion of plaintiff in error for a new trial and in its order and judgment overruling such motion and granting judgment in favor of plaintiff for the amount of the verdict found by the jury in favor of plaintiff, with costs, which order and judgment was duly excepted to by defendant and its exception allowed by the court. Said motion was based on the files and records and proceedings herein, and was made upon the following grounds specified therein and on each thereof, to-wit:

I.

"Insufficiency of evidence to sustain or justify the verdict in the following particulars:

A. "That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

B. "In that plaintiff based her cause of action because on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a roadbed. That the plaintiff had agreed and stated that the words 'and otherwise suffered to become utterly unsafe and unfit as a roadbed' applied to said ties being burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.

C. "That the plaintiff's witnesses admitted that on the night of December 30th, 1911, the plaintiff's deceased husband was in charge of and had charge over Rotary X1, that the fire-

man of this rotary was under the supervision and instructions of the deceased husband, who was engineer and had charge of said rotary; that the fireman of this rotary against the rules and orders of the defendant company cleaned or dumped the ash pan of his rotary on bridge 75A, which bridge was destroyed by fire by reason of the ashes being dumped from said rotary on the day of January, 1912; that the plaintiff's deceased husband was killed by reason of the fire of said bridge caused by reason of the ash pan of said rotary being dumped or cleaned on said bridge, which act was against a known rule of the company and the further known rule that required the plaintiff's deceased husband to extinguish all fire from ashes removed from ash pan at any and all places."

II.

A. "That plaintiff's witnesses admitted that they left Cordova on the 30th of December, 1911, the first terminal of the Copper River & Northwestern Railway Company, or the defendant, and that the second or next terminal of defendant company is located at Tiekel or Mile 101 beyond a point where Bridge 75A is

located; that said bridge being located on Mile 76 and being between the terminal at Cordova and Tiekel.

B. "That the plaintiff's evidence shows conclusively that the reason they were delayed and required to be on duty from the time they left Cordova until they reached Tiekel was because that the rotary that they started from Cordova with met with an accident which necessitated repairing said rotary and returning it to Cordova, and that they were required to await the arrival of another rotary from Cordova, and that during all of the time between said terminals they were on a single track and were fighting snow, and that it was dangerous to stop said rotary while fighting snow, for the reason that a snow or wind would possibly snow them in and delay them for an indefinite time; that said railroad of the defendant is a single track from Cordova, its first terminal, and Tiekel, its second terminal. That the acts which required said employees to be on duty for the time that they were on duty was caused by casualties and unavoidable accidents and the act of God and could not have been foreseen by the defendant, and that said delay was not the result

of a cause known to the carrier or its officers, agents in charge of said employees at the time said employees left the first terminal nor which could have been foreseen by the defendant."

C. "That the plaintiff's witness, Albright, who cleaned the ash pan on the bridge, which fire caused the bridge to burn that caused the death of plaintiff's husband, admitted that the reason he violated the rule of cleaning his fire on the bridge and the further rule of seeing that all fire from ashes removed from ash pan is extinguished, was because they wished to save time, and for the further reason that if he cleaned the pan off of the bridge he would have been required to shovel some snow from the side of the track so that he could use his hoe for the purpose of cleaning out his pan."

III.

"That Bridge 75A was shown to be a safe bridge from the evidence for the reason that this rotary with its engines on the night before the accident to the plaintiff's deceased husband had crossed this bridge several times; that there were not any evidence in this case to show that a track walker or section man is necessary over

that particular portion of the road, nor does the law require that the defendant keep a track walker or section man for the purpose of seeing that engineers or trainmen obey rules and orders."

IV.

"That the verdict is against the evidence and law."

V.

"That the amount of damages allowed in this case is excessive and was influenced by passion or prejudice."

VI.

"Errors of law occurring in the trial and exceptions made by the defendant."

VII.

"Accident or surprise by which ordinary prudence could not have guarded against."

VIII.

"In denying defendant's motion for a directed verdict."

IX.

"That the plaintiff bases the accident upon the following negligence as alleged in her complaint in paragraph 3, which is as follows: 'That on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a roadbed,' it being ruled by this court on a motion to make more definite and certain, and being agreed by attorney for plaintiff that the following words: 'and otherwise suffered to become utterly unsafe and unfit as a roadbed,' referred to ashes and cinders being negligently dumped upon the roadbed. That the plaintiff against the objections of the defendant and exceptions taken introduced in evidence matters relating to track walkers and hours of work performed by the crews of the rotary and other engines pushing the rotary and the train crews on the local train, of the trip of said rotary and trains from the time they left Cordova terminal on the 30th of December, 1911, up until the night of the accident, Jan-

uary 1, 1912. That the pleadings and issues as made up in this case do not allege or in any way refer to such facts as would permit the defendant to anticipate that such evidence would be brought out or introduced or that the plaintiff was basing her cause of action partly on such acts and facts."

X.

"For the further reason that the instructions given on page 3 require that the jury consider whether J. E. Reed met his death by reason of the negligence of the defendant company in failing to maintain and inspect its road, and roadbed, bridges and track, that the law does not require the defendant to maintain and keep inspectors of roadbed, bridges and track until it has been shown by the plaintiff that such was necessary, and in no event does the law require the defendant to keep inspectors for the purpose of inspecting the roadbed and bridges for the safety of one who violates a rule and by violating said rule makes the roadbed or bridge unsafe."

XI.

"For the further reason that the court, on page 5 of its instructions, instructed the jury that in any action brought against any common carrier under or by virtue of any of the provisions of the Act referred to on said page, to recover damages for injuries to or for the death of any of its employees, that such employees shall not be held to have assumed the risks of his employment in any case where the violating of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"That there are no allegations in the complaint and no evidence in the case to the effect that the said J. E. Reed met his death by *by* reason of the defendant violating any statute enacted for the safety of employees which contributed to the injury or death of the said J. E. Reed, and for the further reason that it was shown by the evidence that all work performed by the said J. E. Reed and other employees of the rotary crew and train crews was performed on a single track railway between Cordova, their starting terminal and the next terminal at Tickel or Mile 101, and that the cause of the

death of J. E. Reed was the burning of the Bridge 75A on Mile 75, the fire of which was caused by the deceased permit*ted* his fireman to clean his rotary pan on this bridge, and for the further reason that he did not require or did not put out or extinguish all fire from ashes dumped from this pan onto the bridge, which is contrary to the rules of the company, and plaintiff's evidence shows that the reason he dumped or cleaned his pan on this bridge was because he wished to save time and so he would not be required to shovel some snow from the side of the track where he could stand so as to pull his fire."

ARGUMENT.

No Negligence Is Shown As Alleged or Otherwise.

This action is based upon the Federal Employers' Liability Act. While the Act is not mentioned in the complaint, nevertheless, allegations are there made and evidence was introduced thereunder which showed that the Act applied, and the action was tried and submitted to the jury upon that theory. The liability of defendant, therefore, if any, must be determined with reference to that Act.

DeAitley vs. C. & O. R. Co., 201 Fed. 591.

Kelley's Administrator vs. C. & O. R. Co., et al., 201 Fed. 620.

Michigan Central R. Co. vs. Vreeland, 45 Sup. Ct. Dec., February 15, 1913, page 192.

Adams Express Co. vs. Croninger, U. S. Sup. Ct. Dec., February 15, 1913, page 148.

Winfree, etc., vs. N. P. R. Co., U. S. Sup. Ct. Dec., March 15, 1913, page 273.

Second Employer's Liability Cases, 223 U. S. 1.

Garrett vs. L. & N. R. Co., 197 Fed. 715.

Smith vs. D. & T. S. L. R. Co., 175 Fed. 506.

Cound vs. A., T. & S. F. R. Co., 173 Fed. 531.

Erie R. Co. vs. White, 187 Fed. 556.

McChesney vs. Illinois Central Ry. Co., 197 Fed. 85.

Section 2 of the *Federal Employer's Liability Act* provides that a common carrier by railroad in a territory shall be liable in damages for a death of one of its employees, which resulted "in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." These provisions being in derogation of the common law must be strictly construed.

Fulghan vs. Midland Valley Co., 167 Fed. 660.
Johnson vs. S. P. R. Co., 196 U. S. 1.

It will be seen that this Act makes the carrier liable for a death in two instances. First, where the same results in whole or in part from the negligence of any of the officers, agents or employees of such a carrier, and second, where it results by reason of any defect or insufficiency, *due to its negligence,* in is track, roadbed, etc.

It is not alleged in this case that the death of plaintiff's husband was caused by the negligence of any of the officers, agents or employees of defend-

ant, and no recovery can be had upon any ground of negligence not alleged in the complaint. The negligence alleged is that defendant had negligently

> "allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders, negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed over which cars and locomotives were to be operated,"

and it is alleged that this unsafe and unfit condition of the roadbed was not due to any fault or negligence on the part of the deceased. This is not an allegation of any negligent act on the part of any officer, agent or employee of the defendant, but is an allegation of negligence on the part of the defendant itself, which brings the case under the second ground of liability named in the statute. However, we do not think any recovery can be had in this case either on the ground of negligence of an officer, agent or employee of the defendant, or of negligence on its part in permitting or allowing its roadbed or track to become unsafe as alleged.

There can be no dispute as to the sole cause of the accident in this case, which was the act of Fire-

man Albright of the rotary, in cleaning the ashes, cinders and coal out of the rotary ash pan on the bridge in question, and in failing to put out all fires in such ashes, coal and cinders. There is not a particle of evidence in the case from which the jury could say that the bridge was burned from any other cause, and as plaintiff alleged that it was burned on account of ashes dumped on the bridge, and proved that the ashes were dumped on the bridge, and the bridge was burned thereafter, and did not show any other cause for the fire, it must be taken as conclusively shown that this was the sole cause of the bridge burning.

We contend that even if the complaint alleged that the accident was caused by the negligence of Albright in dumping the ashes on the bridge, and not putting out the fire in them, no case has been made against defendant under that portion of the Federal Act.

We do not think it will be disputed that this provision of the act does not make the carrier an insurer, in favor of its employees, against the negligent acts of fellow employees. The purpose of this provision of the statute is to take away the defense of negligence of a fellow servant, in those cases where at common law such negligence would defeat

an action. Those acts of negligence of a fellow servant which, at common law, would be imputable to the master except for the fellow servant rule, are the acts for which the carrier is made liable by this provision of the statute. But any act of negligence of a fellow servant which would not, at common law, be imputable to the master, is not such act of negligence as he is made liable for by this provision of the statute. We think this is recognized by the decision of the Supreme Court of the United States in the Second Employer's Liability Cases, 223 U. S. 1, where the court says:

> " * * * the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as *was done at common law when the injured person was not an employee.*"

In this case, at common law there could be no liability on the part of the defendant for the act of negligence of Albright, independent of the fellow servant rule, for the reason that in no sense was his

act the act of defendant. If it had been committed by a person not an employee of defendant, under the evidence in this case, there could be no liability because the act was not defendant's act, and no negligence on account thereof could be attributed to defendant. To hold defendant liable for such an act on the part of any person, it must have been shown that the act was committed under its express or implied direction or authority, or that the defendant had knowledge thereof, actual or constructive. But the negligent act and omission in this case, which solely caused the injury, was not done under the direction or authority of defendant, but in direct violation of its express rule; it was in fact, the negligent act and omission of deceased himself, and in no sense the act or omission of the defendant. It is proven conclusively by the testimony offered in behalf of plaintiff that the deceased had charge and control of, and was responsible for all of the actions of Fireman Albright, in the operation of this rotary, which included the cleaning of ashes from the ash pan and the putting out of fire in such ashes. It was not only the duty of the deceased to see that no ashes were cleaned on a bridge, where all the witnesses admitted it was dangerous to clean them, but it was made his positive duty by the rules of the Company, which he knew or was bound to know, to

see that when ashes were cleaned all fire therein was put out. It is shown affirmatively by plaintiff's testimony, that Albright and the deceased were the only persons who knew anything about this ash pan being cleaned at this place, and under these circumstances, the negligent act of cleaning them on the bridge, and the negligent omission to put out the fire in the ashes so that the bridge could not burn, could not be attributed to the defendant, so as to render it liable under this provision of the Federal Statute, or the common law.

Nor could any liability on the part of defendant for this act and omission be based upon the other provision of the statute. This makes the carrier liable for a defect or insufficiency in the track or roadbed "due to its negligence." If the defect or insufficiency complained of was not due to its negligence, then there could be no liability under this portion of the statute. There is no statute applying to Alaska, which defines the obligation of a carrier with reference to making its track and roadbed safe or secure. Whether or not defendant was negligent in this case, therefore, is governed by the common law. It is a well settled rule of law that before a carrier can be held guilty of negligence in permitting its track or roadbed to become defective or

insecure, it must have actual or constructive knowledge of the conditions for which it is sought to make it responsible.

In this case, there is not a particle of evidence to show that any one in authority connected with the defendant railroad, knew or had the slightest reason to anticipate that the ash pan of the rotary would be cleaned on this bridge, or that Albright or the deceased would disobey the Company's rule, and fail to put out any fire in the ashes when they were cleaned. In fact, the evidence in behalf of plaintiff shows affirmatively and conclusively that the only persons who knew these facts were Albright and deceased themselves. Certainly as between defendant and the deceased and his representatives, the knowledge of deceased was not the knowledge of defendant. Nor could defendant be held to have constructive knowledge that deceased would do, or permit the fireman under his control to do such a hazardous thing as clean the ash pan of his rotary on the bridge and not put out the fire. This was especially hazardous at this time, because, as Albright testified, when he was at the snow bank a half a mile or a mile north of the bridge, a very short time before he cleaned the ashes out of the ash pan, he had cleaned his fire and filled up the ash pan (R.

p. 264), which would necessarily make a lot of live coals among the ashes, and make it even more dangerous to clean the pan on the bridge. Much less could defendant have constructive knowledge that deceased would violate its positive rule requiring all fire in ashes dumped on the roadbed, to be put out. Before a master can be held negligent in such a case, both under the statute and common law, it must have had knowledge of the acts or omissions complained of, so it might avoid the consequences thereof; and such knowledge, either actual or constructive, lies at the very foundation of a charge of negligence against him in a case like this.

> "In all cases where the establishment of an employer's statutory liability depends upon its being proved that he was guilty of negligence in the premises, the general rule of the common law is applicable, that culpability cannot be inferred, unless it is shown that the defendant had actual or constructive knowledge of the conditions for which it is sought to make him responsible."
>
> *Labatt's Master and Servant* (2nd Ed.), Vol. 5, p. 5045 and cases cited.

> "The servant cannot succeed in his action where neither the employer himself nor his rep-

resentative within the meaning of this subsection, had knowledge, actual or constructive, of the existence of the defect which caused the injury."

Labatt's Master and Servant (2nd Ed.), Vol. 5, p. 5176 and cases cited.

The court instructed the jury that they might find the defendant negligent on two other grounds:

First, because it permitted the crew of this rotary to work more than sixteen consecutive hours, in violation of the Federal Hours of Service law; and

Second, for a failure to provide a track walker or make inspection of the track, so as to discover this fire before the accident.

We will argue later that the admission of evidence as to a violation of the Hours of Service law, and the instructions on this question, and on the question of a track walker and inspection, were erroneous, but we do not think that in any event, negligence in this case could be predicated upon either of these grounds. Before any recovery could be had in this case on the ground of negligence for a violation of the Hours of Service law, it was necessary for plaintiff to allege and rely upon such

violation as a ground for recovery. There is no allegation in the complaint that defendant was negligent in this particular, nor is there a particle of evidence to show that any one in authority with defendant knew that this law had been or would be violated.

The allegations of the complaint are that defendant was negligent in allowing its ties to be burned and destroyed by ashes dumped thereon. It is not alleged that these ashes were dumped on the bridge by Albright, or that he or Reed neglected to put out the fire in the ashes, because they had worked more than sixteen consecutive hours; nor is there a particle of evidence to show, or from which the jury had any right to infer, that the length of time Albright and Reed had been working on this trip had anything whatever to do with their cleaning the ash pan at this place, or failing to put out the fire in the ashes. Albright expressly testified that one of the reasons why the ashes were dumped at this time and place was to save time (R. p. 274), and the other reason was that it was hard to clean the ashes at any other place, because of the frozen snow and ice close to the track (R. p. 259), and he testified that the reason he did not put any water on the ashes was because he thought the fire and ashes

were all off the ties (R. p. 277). While he said he was tired at this time, he did not say, nor is there any evidence from which it can be inferred, that he cleaned the pan at this time and place and failed to put out the fire in the ashes, because he was tired, or because he had worked over the statutory time. Certainly, in the absence of any allegation of negligence in the violation of the Hours of Service law, or a particle of evidence that the negligent acts were committed, or the rules violated, because of a violation of this law, no negligence could be based thereon.

There was no allegation in the complaint of any negligence on the part of defendant in failing to provide a track walker or to inspect the track at this time and place. Nor was there a particle of evidence that defendant did not provide such a track walker or inspect the track. The only evidence on this question was the testimony of witness Lee, that when the train ran into the snow bank above the bridge, before backing back to take water, they had picked up some section men and brought them back to load the coal on to the rotary; that he had seen these men around the bridge while they were there, but did not see them when they were leaving (R. p. 96), and the following testimony, received over

defendant's objection. Lee was asked on re-direct examination by Mr. Cobb, the following questions:

> Q. "Do railroads that you have been accustomed to usually resort to any other method to see that the track is in order before a train is sent out?"
>
> He answered: "Yes, sir."
>
> Q. "What is done to safeguard the track besides the sprinklers?"
>
> A. "Why, they have track walkers."

On defendant's motion, this answer was stricken out (R. p. 143).

If a recovery could be had in this case on the ground that defendant was negligent in not providing track walkers or inspecting the track at this time and place, it was certainly necessary for plaintiff to allege and prove that defendant did not have such track walkers, or did not inspect the track. Plaintiff neither alleged nor proved this fact, and certainly a verdict based on negligence in this particular cannot stand in this case.

Furthermore, neither Reed nor his representative could base a charge of negligence against defendant on a want or having track walkers to inspect this track, to see if he had violated a positive rule

of the Company, by doing such a negligent and hazardous thing as to clean an ash pan full of live coals on a wooden bridge and not see that the fire in them was put out. Neither Reed nor plaintiff could be heard to say that defendant did not act as a reasonable and prudent master would act, if it did not anticipate that this negligent act and omission would be committed by Reed or by Albright, for whose acts he was responsible, and send some one to inspect the bridge. We fail to see how the court, under the pleadings and evidence in this case, can say that the defendant committed any act or omitted to do any act, which, as between it and Reed and those having no greater rights than he had, can be charged as actionable negligence under the Federal statute.

We think this is true for another reason. The Federal statute does not change the rule that a carrier is not liable for the negligence of an employee, or for its own negligence in the particulars mentioned in the section referred to, unless such negligence is the proximate cause of the injury or death. In this case, as we have stated, the evidence shows conclusively that the sole cause of the accident was the negligent act and omission of Reed and Albright. No act or omission on the part of the

defendant contributed in any way to the accident. Their negligence, wholly unknown to defendant, and which it had not the slightest reason to anticipate, was the sole, proximate cause of the accident, which would prevent any recovery against defendant either under the common law or the statute.

The trial court charged the jury that it was the duty of defendant to keep and maintain its track, roadbed and ways in a reasonably good and safe condition for the operation of its engines and trains over the same, and to exercise such care in that respect as not to unnecessarily endanger the lives of its employees operating engines over the road, and that a failure on defendant's part to exercise reasonable and ordinary care in that respect is negligence which would render it liable for injuries resulting from such negligence. That it was the duty of the defendant to have the track and ways watched and inspected at sufficiently reasonable intervals, to discover and repair or guard against defects arising from the operation of the road, that would endanger the lives and persons of its employees operating engines over the same, and that a failure to exercise ordinary care in that respect is negligence; and that if Reed was killed because of the negligence of defendant in failing to keep its

roadbed, track or ways in a reasonably safe condition, then their verdict should be for plaintiff.

Assignment of Errors No. 27:

It also instructed the jury that defendant was liable to plaintiff if the death of Reed resulted, in whole or in part, from negligence of *any* of defendant's officers, agents or employees, or by reason of *any* defect due to its negligence in its roadbed, bridge, ties or track at this point.

Assignment of Errors No. 29:

By these instructions the court told the jury that if they found that defendant had failed to have a track walker or inspect the bridge, between the time the ashes were dumped on the bridge and the accident, that defendant would be liable in this action. These instructions were given, not only without an allegation or a particle of evidence to base them on, but they took away from the jury all consideration of the questions of contributory negligence of the deceased, and of his assumption of the risks involved.

Again, by these instructions, the court told the jury that plaintiff might recover if they found that the death of Reed resulted, *in whole or in part,* from the negligence of *any* of defendant's employees, or

by reason of *any* defect due to defendant's negligence, in its roadbed. The court did not limit the right of recovery to the negligence of Albright or Reed, which was the only negligence on the part of any of the defendant's employees shown by the evidence. Nor did the court limit the right of recovery to defendant's negligence as alleged in the complaint, or to negligence in the matter of the dumping of the ashes on the bridge, and the failure to put out the fire, which was the only possible negligence shown by the evidence; but the court permitted the jury to base a verdict upon the negligence of any other of defendant's officers, agents or employees, or upon any other defect in the bridge which they might have thought appeared from the evidence.

It certainly requires no argument or authorities to show that such instructions, under these circumstances, were erroneous.

The court also instructed the jury that it was unlawful for defendant to require or permit its employees to be or remain on duty for a longer period than sixteen consecutive hours, and that if at the time of the death of Reed, defendant was guilty of violating this statute, and such violation, *in any way contributed to such death*, then, even

though Reed was guilty of contributory negligence, such negligence should not be considered by them in assessing the damages against defendant and in favor of plaintiff and her children. The jury were given to understand by this instruction that it was negligence on the part of defendant to allow or permit Reed and Albright to work more than sixteen consecutive hours upon this trip, and that if they found that this violation contributed to the accident, they must find for plaintiff, and could not reduce the damages by reason of any contributory negligence on the part of deceased.

In the absence of any allegation of negligence in this regard, or of a particle of evidence to show that the length of time Reed and Albright had worked on this trip, had anything whatever to do with the burning of the bridge, this instruction was certainly improper.

Before plaintiff could base a right to recover on a violation of the Hours of Service law, she must have alleged such violation as one of the grounds of negligence relied on, and alleged and proven that such violation was the cause of or contributed to the accident.

Under all the evidence in the case and the pleadings, it seems to us clear that plaintiff failed to

show any negligence upon the part of defendant or its employees, for which a recovery could be had in this case. It is a well settled principle of law that the measure of the duty of the master to the servant, and consequently the rule by which the master's negligence is to be determined, depends not only on the knowledge of the master of the conditions causing the injury, but also on the knowledge of the injured servant. Servants cannot be heard to say that the master is negligent in any particular, where the servant has all the knowledge of the conditions complained of which the master has, and much more so is this true where the servant himself, not only has the only knowledge of these conditions, but he himself is responsible for those conditions. The servant's knowledge of the risk conclusively negatives the inference that the master was under any duty to protect him therefrom; the servant is precluded by his own knowledge, and in this case by his own acts and omissions, from enforcing any right of action on account of any failure on the part of the master to take precautions against injury from these conditions, known to the servant.

Labatt's Master and Servant (2nd Ed.) Sections 952, 953.

II.

Assumption of Risk.

It is shown conclusively in this case by the testimony of witnesses for plaintiff, that deceased knew these ashes had been dumped upon the bridge by his fireman, and that although he asked the fireman if he was sure the fire in the ashes was all put out, he did nothing himself to ascertain if this was true. No other employee of defendant was shown to have known anything about the dumping of these ashes. Deceased knew, or must have known, the danger of dumping ashes on a bridge, and that the positive rule of the Company required all fire from ashes removed from ash pans to be extinguished, and that he was held equally responsible with his fireman for seeing that this was done. Deceased not only knew all that defendant knew or possibly could have known about this matter, but he and his fireman were the only persons who knew about it. Under these conditions, we think deceased assumed all the risks of injury in this case.

Section 4 of the Act of 1908 provides that in an action brought under the provisions of that Act, the "employee shall not be held to have assumed the risks of his employment, *in any case where violation*

by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee." The court will note that Congress has recognized in this and the preceding section of the Act the clear distinction between contributory negligence and assumption of risk. In Section 3, it has taken away the defense of contributory negligence entirely, except that the employee's damages shall be diminished in proportion to the amount his negligence contributed thereto. But the statute has taken away the defense of assumption of risk only where the carrier has violated some statute enacted for the safety of the employee, which violation contributed to the injury.

The statute being in derogation of common law, must be strictly construed, and the court cannot read into the statute anything not clearly within its express terms. The rule of assumption of risk has its basis in the principles of the common law, and depends for its existence upon the relation of employer and employee existing between the parties. While some courts base the rule upon the maxim, "*volenti non fit injuria,*" the free translation of which is that he who prefers to remain in the presence of an obvious or manifest danger cannot recover for injuries resulting therefrom, other courts

base the defense upon the contract of employment between the parties.

Whether this rule is based upon the maxim "*volenti non fit injuria*" or upon the contract of employment between the parties, we do not think makes any difference in this case, although we think this court is committed to the rule that the defense is based upon contract.

> *Welsh vs. Barber Asphalt Paving Co.*, 167 Fed. 465.

If based upon contract, then the effect of the contract between the parties in this case was that deceased contracted to run over the bridge in question, after the ashes had been dumped thereon, and the fire not put out, and that it should not be negligence on the part of defendant not to ascertain whether or not the fire in these ashes had been put out, or the bridge burned therefrom. On the other hand, if the defense is based on the maxim, then it clearly appears that he voluntarily ran over this bridge, knowing that the ashes had been dumped thereon, and the possibility of their setting fire to the bridge.

We do not think there can be any question but that the defense of assumption of risk under the

Federal statute remains as it was at common law, except in the one instance named in the statute, namely, where the injury is caused by the violation of a statute for the employee's safety.

When we consider that Congress, in the Second Employers' Liability Act, undertook to cover the entire field so far as was desired, of the relationship between carrier and employee, and in doing so took occasion to expressly designate the particular risks of injury which the employee should not assume, it logically follows that Congress meant to declare that the common law still remains in existence as to all other cases where the defense would be available in the absence of this statute. It cannot be claimed that Congress intended to repeal the entire common law in relation to assumption of risk, and unless it did so, the common law, except as modified by the express terms of Section 4 of the Act, is still in force.

The Supreme Court of Idaho, in the case of *Neil vs. Idaho & W. N. R. Co.,* 125 Pac. 331, 335, speaking through Mr. Justice Sullivan, says:

> "1. We will first determine whether said Act of Congress is applicable to the facts of this case.

"That Act of Congress refers only to the inter-state commerce, abrogates the fellow-servant rule, extends the carrier's liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk."

The learned judge, at page 336, indicates in what manner the defense of assumption of risk has been restricted, saying:

"Under the provisions of Section 4 of said Act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees the defense of assumption of risk remains as at the common law."

The Supreme Court of Texas, in the case of *Freeman, Receiver, vs. Powell,* 144 S. W. 1033 (decided February 3, 1912), in which Mr. Justice Conner, speaking for the court, after quoting Section 4 of the Act of April 22, 1908, said:

"It thus appears that under the Federal statute a complaining employee to whom the Act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or death, and of this there is no contention in this suit."

We think our contention in this regard is also clearly recognized in the following cases:

Scott vs. C. R. I. & T. R. Co., 141 N. W. (Iowa) 1065;

Texas & P. R. Co. vs. Harvey, U. S. Sup. Ct. Dec. May 15, 1913, page 518;

Boston & M. R. Co. vs. Benson, 205 Fed. 876;

Second Employers' Liability Acts, 223 U. S. 1.

It follows, therefore, that whether or not deceased assumed the risks involved in this case, depends upon the rule at common law. There, a servant assumes not only the ordinary risks of his employment, but he assumes all extraordinary and abnormal risks, of which he knows, or which are so patent and obvious that he cannot be heard to say that he did not know of them. He cannot shut his

eyes to risks which he knows, or which are so obvious that a man of his age and understanding is bound to know them, and then charge his master with negligence in failing to protect him from these risks. Much more is this rule correct where the testimony shows that the risks were caused by the negligent acts or omissions of the servant himself or of one for whose conduct he is responsible, and which only he and those responsible to him knew of, and which were unknown to the master, and which the master had no reason to anticipate.

Katalla Co. vs. Rones, 186 Fed. 30;

Pacific T. & T. Co. vs. Starr, 206 Fed. 157;

Texas & P. Co. vs. Harvey, U. S. Sup. Ct. Dec., May 15, 1913;

Little Rock & M. R. Co. vs. Barry, 84 Fed. 944;

Labatt's Master and Servant (2nd Ed.), Section 595.

Defendant, by numerous requests, asked the court to instruct the jury that under the evidence in this case, deceased assumed the risk of injury and plaintiff could not recover. These requests were refused, and the jury was instructed that if they found the accident occurred through the negligence of defendant, then Reed did not assume the

risk of dangers due to that negligence; and the court instructed the jury that by the term "assumed risks" was meant that the deceased was presumed "to have assumed all the risks and hazards incident to the employment, and known to him." But by its other instructions, the court clearly told the jury that if the accident occurred through the negligence of defendant in permitting the train crew to work over the statutory time, or by omitting to properly inspect the track, then their verdict should be for plaintiff, and thereby it took away from the jury all consideration of the defense of assumption of risk.

We think this was clearly erroneous, and that the court should have decided, as a matter of law, under the evidence in this case, that deceased did assume all risks involved; or in any event, that defendant's requested instructions should have been given, and that the jury should have been told that even if defendant was negligent in the matters alleged and shown by the evidence, nevertheless, that if they found deceased knew all the conditions constituting such negligence, and made no objection, but ran his engine over the bridge with that knowledge, then plaintiff could not recover.

Hours of Service Law.

1. Unquestionably, under the Act of Congress of March 4, 1907, enacted to promote the safety of employees and travellers upon railroads by limiting the hours of service, if an accident occurred by reason of violation of the terms of this act, the person injured could base his right of action upon such violation.

It is, however, elementary (and therefore no authority will be cited to the point), that where one relies upon a breach of statutory duty, that breach must be alleged and proven. An examination of the complaint (R. p. 2) discloses that a violation of the aforesaid Act was not relied upon nor charged in the complaint. As well stated by the court in the instructions given to the jury, the only allegations of negligence were that the deceased met his death by reason of a defect caused by allowing ashes to be dumped on the roadbed (R. p. 243, middle of page).

In the face of well recognized principle, and in the entire absence of allegation, the plaintiff was permitted to prove that the continuous hours of service of the crew on the derailed train exceeded the statutory limit (R. p. 59, testimony O. L. Larson). This testimony was not in avoidance of any affirmative matter offered by the defendant, but was

given as direct evidence of negligence upon the part of the employer. To the objection urged by defendant that the testimony was irrelevant to the issues, the trial court called attention to the fact that the testimony would be deemed competent and relevant as tending to show a violation of the statute, and therefore liability of the defendant. True, the language of the court in the presence of the jury was not explicitly to that effect, but the evident purpose of his language and the direct effect of the ruling went to that extent (R. p. 59). So explicit was the ruling of the court upon the point, that the defendant objected to any and all evidence offered on that point and that an exception be allowed to the ruling admitting that line of testimony. The court assented to that form of objection and allowed the exception (R. p. 87). Thereafter, all testimony going to this point was admitted under that ruling and exception.

The case was, therefore, submitted to the jury under wholly erroneous and prejudicial ruling and testimony, and under a claim of a ground of negligence not in issue and wholly unwarranted in law, and which were necessarily pressed upon the attention of the jury, not only in the evidence and by the argument, but also by the ruling of the court. Nor, as we shall hereafter notice, did the court

neglect to call this statute to the attention of the jury in the instructions given. The evidence relating to the hours of service was not offered or received for any other purpose except to show a breach of statutory duty by the defendant. The effect of this evidence, and of the ruling in receiving it, was to charge the defendant with an act of negligence and to impress the jury with the view that by reason of such act the defendant had rendered itself liable in this action; and this method, unsupported as it was by any proper rule of evidence, could not be otherwise than extremely prejudicial to the defendant, and constituted such error that a new trial should have been granted. When we look at the circumstances of this case, and then view the size of the verdict returned, we must search for some reason which influenced the jury in assessing such gross damages. Unless it should be admitted that the jurors were actuated by passion or prejudice, arising from their condition of mind, it may well be believed that they were led into a mistaken view of the case by the error here complained of.

2. Now conceding, for the purpose of argument, that the evidence touching the hours of labor was competent and relevant under the issues, yet the action of the court in submitting this matter to

the consideration of the jury was grave error. It not only had a tendency to prejudice the minds of the jurors, but under the instructions of the court it deprived the defendant of its defenses.

The court charged the jury as to the provisions of the act approved April 22, 1908, and the amendments approved April 5, 1910, relating to the liability of common carriers by railroads, particularly calling attention to that portion of the act which provides, that any employee shall not be held liable to have assumed any risks, where the violation by the carrier of any statute enacted for the safety of an employee contributed to his injury or death (R. p. 334). The court then further instructed the jury, touching the Hours of Service law, setting out its provisions and declaring the time when such law became effective and in force (R. pp. 337 and 338). The court further explicitly and directly charged that if there had been a breach of the Hours of Service law which in any way contributed to the injury of deceased, then any contributory negligence on the part of the deceased was not to be considered by the jury.

While there was no allegation of a breach of the Hours of Service law, still the evidence erroneously received relating to continuous hours of ser-

vice did not in any way tend to show a connection between the working beyond the statutory time and the happening of the accident.

In the case of *St. Louis I. M. & S. R. Co. vs. McWhirter,* decided June 10, 1913, reported in No. 17, page 858, advance sheets of Opinions of United States Supreme Court, L. C. P. Co., the Supreme Court had before it the following facts:

The deceased was employed as a flagman by the defendant company, and was run over and killed by the train on which he was serving. It was alleged that his death resulted from wrongful and negligent acts of the conductor and engineer in charge of the train, and of the train dispatcher and other officers of the company, and that there had been a violation of the Hours of Service act, and that the negligent acts of the officers of the defendant and the violation of the act aforesaid were the proximate and sole causes of the injury and death. The deceased dismounted from the engine to throw the switch, running ahead of the engine to perform that service, and in some manner fell under or was struck by the engine from which he dismounted and which was following him. It will be noted that in that case, contrary to the fact in the case at bar, the violation of the statute was charged as a proximate cause of

the accident. The court held that it was impossible to recover, since the purpose of the act was not to subject carriers to the liability of insurers; that no such liability is expressed in the statute, and it cannot be supplied by implication; that where negligence is charged, it must be shown that the alleged negligence was the proximate cause of the damage; that conceding that a case could be presented where the mere proof of permitting work beyond the statutory time, together with facts and circumstances connected with the accident, might justify the conclusion of negligence and the inference of proximate cause, yet the mere act of permitting an employee to work beyond the statutory period, created no liability irrespective of the connection between the alleged negligence and the injury complained of; and, further,

> "We are clearly of the opinion that as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to do so

would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

The court further held that there was no reasonable tendency in the evidence connecting the permitting of the working over time with the accident:

"First, because we think there is nothing in the proof concerning the action of the deceased from which an inference could be drawn, that his jumping from the pilot of the slowly moving engine, was in any way caused by the fact that he had been working over time; second, because we think there was no proof tending to show negligence on the part of the engineer, and therefore obviously no room to conclude that the fact that he had worked over time negligently contributed to the accident."

As alleged in the complaint and proven upon the trial, the cause of the accident was the dumping of ashes and fire upon and along the bridge timbers and structure. The ashes were dumped, as we have heretofore noted (see statement of the case), by the fireman under the direction and with the consent of the deceased engineer. Was there any causal con-

nection between exceeding the limit of hours of service and the dumping of these ashes? Manifestly, there was none; because, first, the fireman believed it was a favorable opportunity to dump the ashes at that point, while the engine was being filled with water, and there was no proof from which an inference could be drawn that this accident was in any way caused by the fact that he had been working over time; and, second, because the engineer fully understood and agreed to what the fireman was doing, and the acts of the fireman in cleaning the pan were done under the engineer's direction, and the proof shows that the engineer was not under any disability at the time, and there was no proof tending to show that, on account of having worked over time, the engineer negligently contributed his direction and consent to the cause of the accident. On the contrary, the proof shows that the engineer and fireman were in the possession of their even faculties, and for several hours after the dumping of the ashes, creating the cause of the accident, well and carefully managed the rotary and the engine where they were engaged. There is not a suggestion in the sworn proof that the working of over hours remotely contributed to their action, and as stated by the Supreme Court "the inquiry whether there was any proof having such tendency is not to be

solved by indulging in mere surmise or conjecture or by resorting to imaginary possibilities."

3. Section 3 of the Hours of Service act (34 Stat. L. 416) provides that the act shall not apply where the delay is the result of a cause not known to the carrier or its proper officer at the time an employee left a terminal, and which could not have been foreseen. It should be remembered that this railroad was being operated in a far northern country, and that the conditions were such that it was impossible to ascertain at the terminal of Cordova on the water, what weather conditions might by chance be encountered before the end of an ordinary run. Under ordinary weather conditions in the winter time, and if no severe storms or snow slides were encountered, the trip from Cordova to the end of the division was easily made several hours under the time limit. On this particular trip, the delay and extra hours of service were occasioned and necessitated entirely by the extraordinary quantity of snow accidentally encountered, together with delays occasioned by the disabling of a rotary while waiting for a second rotary and delay in taking water.

Witness Larson, who was the conductor on the regular train following the snow train, testified that

this was the stormy season, and that the rotary was fighting snow; that the reason they took this length of time in reaching Tickel was on account of the snow encountered (R. pp. 67, 69), and that it was not a good plan to stop very long at a time at any point between Cordova and Tickel, because the train was liable to be snowed in and become stalled there, and that it was necessary to keep the rotary going to prevent the train becoming blocked between these terminals (R. p. 68).

Witness Lee, engineer of one of the pusher engines in the rotary train, testified that they were "bucking snow" on this trip, and that the reason it took so long to make the trip was "heavy snow," "it was heavy snow—we were going right along, though, but making slow time;" that the snow was not so heavy up to Mile 52, but from that point "it was continuous" (R. pp. 106, 107). On cross-examination he testified that the reason they worked over sixteen hours on this trip was because of the accident to the first rotary, and the heavy snows encountered; that it would have been dangerous to the passengers and mail to stop most places along the line; that he had known the rotary to be snowed in for three weeks along this line (R. pp. 147, 148).

Fireman Kitsman of one of the pusher engines, testified that they were "fighting the snow all the way up" from Mile 55 to bridge 75-A (R. p. 182).

Engineer Townsend of the train following the rotary, testified that there was heavy snow where the first rotary broke down, and that on some trips it might take three or four days to go from Cordova to Tiekel, while on the following trip they might make it in eight or ten hours (R. pp. 292, 293).

Witness Wilson, who was conductor on the rotary train and was called as a witness for plaintiff, was afterwards called as a witness for defendant, and on cross-examination, testified that when they left Cordova the Company could not tell how long it would take to make the trip; that he did not think anybody at Cordova "knew what the snow conditions were at that time;" that they had no telegraph or telephone communication along the worst part of the line, and that the only means the Company had of finding out what the snow conditions were along this line was "through the train." He also testified that when they left Cordova, a train left Chitina to meet them at Tiekel, which was only thirty miles from Chitina; that it was not possible for anybody to tell when leaving Cordova at this time of the year how long it would take to go be-

tween any two points on this railway line; that sometimes when they left Cordova during December or January at eight o'clock, they might arrive at Chitina at four or five o'clock that evening, and again, that they might not get as far as Mile 49 in the same length of time; that they could not tell anything about it until they met the snow conditions along the line; that sometimes when they left Cordova, there might not be any snow at all in Abercrombie Canyon, but five minutes before they reached the Canyon, there might be a slide that would fill it so as to take two or three days to get through, which condition was true of other points along the line. He also testified that the reasons for the delay on this trip were the breaking of the rotary and the weather conditions (R. pp. 326-328).

It will thus be seen that even though negligence had been charged in this respect, and even though these delays had contributed to the accident, yet the delays were not the result of a cause known to the defendant or its officers and which they had reason to apprehend.

It should constantly be kept in mind that the conditions existent in Alaska are not conditions which Congress had in mind when enacting the law in question. In thickly settled communities and in

localities where weather conditions are more settled and better understood, and where railroad corporations can be equipped to meet the provisions of the act, a situation is presented different from the case at bar. In operating in a climate where sudden storms and slides in the mountains are apt to obstruct the road, and where the uninhabited character of the country is such that communication must be had by means of the very train which is being delayed, delays occasioned as in the instance at bar come squarely within the excepting provision of the act.

Contributory Negligence and the Instruction Taking Away That Defense.

The rules of defendant required its employees to extinguish all fires in ashes removed from ash pans, and that no excuse would be taken for failure in that regard, and that engineers would be held equally responsible with firemen in such matter. The fireman on the rotary cleaned out an ash pan on and about the timbers of the bridge, and the deceased engineer in charge of the rotary knew that the pan was to be cleaned, and knew before he left the bridge that the pan actually had been cleaned. (See statement of case above). The action of these

two employees caused the accident. They were jointly liable to the Company under its rules, and under any rule of law, for the happening of the accident. They assumed all risk of the accident, being the parties who put in motion the forces creating the accident. If we should go so far as to concede that the action of the fireman was the act of a fellow servant, for which the Company would have been liable to the deceased engineer, still, under any view, if the fireman was guilty of negligence, the engineer was guilty of contributing negligence. If it were an act of negligence on the part of the fireman to clean the pan and destroy the bridge (and that is the basis of this action), then it was contributory negligence on the part of the engineer to have acquiesced in this act and to have disobeyed the rule of the Company in respect thereto. It occurs to us that no amount of argument can lend cogency to this statement of the case, and that no amount of authority can add weight to it. It is an indisputable proposition.

Viewing the act of the deceased, then, at this time, as one of contributing negligence, the defendant was entitled to have that fact submitted to the jury for the purpose of having the damages reduced in the proportion provided for by the Second Em-

ployers' Liability Act. The Circuit Court of Appeals in holding that a defendant was entitled to sufficient instructions as to the plaintiff's contributory negligence in a case arising under the Employers' Liability Act, uses this language:

> "True it is that the plaintiff's contributory negligence was not a bar to the action; but it was the duty of the jury to consider such contributory negligence, if any, in fixing the measure of damages."

Ill. Cent. R. Co. vs. Nelson, 203 Fed. 956.

The trial court very properly instructed the jury that if the engineer neglected to have the fire removed from the rotary pan extinguished, or if the fire removed from the ash pans was not extinguished as required by the rules of the Company, and in consequence the roadbed was rendered unsafe, that the deceased was guilty of contributory negligence (R. pp. 341, 342), but the jury were charged at two points in the instructions that they should not consider the question of contributory negligence, in case there had been a violation of the labor hour laws which in any way contributed to the injury.

These instructions totally deprived the defendant of any matter of defense or reduction of damages by reason of the contributory negligence of the deceased. The instructions were erroneous, first, because the court failed to define to the jury the method by which they should determine that the violation of the labor hour laws contributed to the accident; and second, because the evidence shows conclusively that such violation did not in any manner contribute to the injury of the deceased.

The evidence being what it was and is, and the court having submitted to the jury the act itself without sufficient definition to guide them in its application to the facts at bar, there can be no doubt that the jury understood that the effect of the violation of hours of service was to create an unconditional liability for all accidents happening during the period beyond the statutory time, irrespective of proof showing any connection between the accident and the working over time. Nor can it be doubted that the court in his ruling upon the reception of evidence, and in the instructions to the jury, held and intended to hold that by operation of law a carrier is an insurer of the safety of its employees while they are working beyond the statutory time. While it is true that the instructions given by the

trial court did not explicitly so state, nevertheless, such instructions must have rested upon that interpretation of the statute. We appropriate to our own use here the language of the Supreme Court of the United States directed to a like condition of the record:

> "(a) Because beyond the proof of working over time, there was no offer of proof connecting the accident with the working over time; and (b) because it is apparent that the court of Appeals interpreted the charge upon which it was passing as having that significance, and affirmed it for that reason."

St. L. &c. Co. vs. McWhirter, supra, p. 864.

The decision in the *McWhirter* case, rendered since the trial and verdict in the case at bar, and the reasoning and the decision in that case being leveled at a like record to the record at bar, it would seem that the errors which call for a reversal of that case constitute reversible errors here.

MOTIONS FOR DIRECTED VERDICT AND JUDGMENT.

At the conclusion of the testimony, defendant moved for a directed verdict (R. p. 239). Upon the return of the verdict, defendant moved for judg-

ment notwithstanding the verdict (R. p. 365). Both of these motions were overruled, but should have been sustained. They were based upon the theory that the negligent act charged in the complaint was performed by the consent of the deceased engineer. The allegation of the complaint, supported by the evidence produced, clearly called for the judgment demanded by these motions. The court by instructions sustained the position taken by these motions, but nevertheless, submitted the undisputed facts to the jury, and then confused the issues by giving contradictory and inconsistent instructions.

The court charged, first, as follows:

> "It is undisputed that the cause of the rotary leaving the track on the said bridge 75-A was the burnt condition of the ties and superstructure, leaving insufficient support to sustain the weight of the rotary." (R. p. 332).

It was further charged that the plaintiff alleged that the deceased met his death by reason of the defendant permitting or negligently allowing ashes to be dumped on the roadbed, and that plaintiff can only recover upon said allegations (R. p. 343). Since it appeared from the evidence that the injury to the roadbed had been occasioned by the combined negligence of the fireman and deceased engineer, and

since it further appeared that under the rules of the Company, engineers were held directly responsible for such a negligent act, there was no reason, either at common law or under the Employers' Liability Act for submitting any question to the jury. But with this condition of the record before the court, and not content with charging the jury correctly as shown by the two instructions last above noted, the court proceeded to give totally contradictory and inconsistent charges. It was charged that the defendant was liable if the accident resulted from the negligence, in whole or in part, of *any* of the defendant's officers or employees, or by reason of *any* defect in the roadbed due to the Company's neglect (R. p. 337).

Having thus charged that any negligence, in whole or in part, of any officer or employee would constitute negligence of the Company, the court further charged that defendant would be negligent in not having a track walker to inspect the road, when the complaint did not charge and the evidence does not disclose that there was no track walker.

Thereupon, and in entire contradiction and inconsistency with the instructions last above noted, the court charged that if the deceased met his death through the negligence of the fireman on the rotary

by reason of having dumped the ashes and failing to extinguish them, then the verdict must be for the defendant (R. p. 340); and further instructed that if the defendant was in no way negligent in its duties, and the injury to the deceased occurred by reason of deceased's own negligence and the negligence of his fellow servants, then the verdict must be for the defendant (R. p. 341).

In other words, the court by different instructions, contradictory in their character, wholly inconsistent as matters of statement of law, confusing alike to the professional or the lay mind, submitted this cause to the jury. In one breath the court charges that if the deceased was injured from the negligence, in whole or in part, of any officer or employee, the Company was liable, and then charges in the next instant that if the injury occurred alone by reason of deceased's negligence or the negligence of his fellow servants, then the defendant was not liable. In one instant it is charged that if after the bridge was set on fire by the rotary, the defendant failed to provide a track walker to inspect the road at the point in question, the Company was liable, and in the next breath it is charged that if the deceased met his death alone through the negligence of the fireman by reason of having dumped ashes

from the pan, that their verdict must be for the defendant.

The rule of law is that instructions must be so framed that they will not only state the law correctly, but be in harmony with each other, to the end that the jury may be aided and not misled. And instructions which are inconsistent or contradictory are erroneous and almost invariably held as ground of reversal, since it is not for the jury to select from contradictory instructions those which correctly express the law.

11 *Encyc. of Pleadings and Practice*, p. 145.

It may be stated with entire confidence that the only instructions of the court relating to the liability of defendant under the issues and the evidence, were the two instructions first referred to in this division of the argument, and that if such instructions had alone been given, defendant would have been entitled to receive a verdict of the jury, and its motion for a judgment notwithstanding the verdict would have been sustained had the jury disregarded such instructions.

MEASUREMENT AND APPORTIONMENT OF DAMAGES.

The verdict returned was for the gross sum of $20,000 in favor of plaintiff and against defendant (R. p. 378). This verdict ought not to be sustained for the reasons, first, that it was returned under instructions touching the measure of damages that opened to the jury the door for speculation and conjecture, and which instructions were against the rule as established by the Supreme Court of the United States; and second, that the damages were not apportioned to those for whose benefit the action was brought as required by law.

1. In a series of cases recently decided by the Supreme Court of the United States, it has been held that the damages recoverable in actions under Employers' Liability Acts are limited strictly to the financial loss sustained by those for whose benefit the representative is suing.

> *Michigan C. R. Co. vs. Vreeland,* 227 U. S. 59; 33 Sup. Ct. Rep. 192;
>
> *American R. Co. vs. Didricksen,* 227 U. S. 145; 33 Sup. Ct. Rep. 224;
>
> *Gulf &c. R. Co. vs. McGinnis,* 228 U. S. p. —; 33 Sup. Ct. Rep. p. 426.

In the instant case the court charged that in estimating the loss to the plaintiff and her minor

children, it was proper to take into consideration the age, health, etc. of the deceased, and "the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family, and thus determine the value of the life. From this amount deduct the personal expenses of the deceased, and the balance, reduced to its present value would be the present amount of the verdict, provided that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority."

The evidence showed the age, habits and occupation, and earning capacity of the deceased, and the plaintiff testified as to how long she and deceased had been married, the ages of the children, and that the married relations between herself and the deceased were happy. That was the extent of the testimony (R. p. 293). No evidence was introduced to show what care and attention, instruction or training the deceased might be expected to give to his wife or his children. The court told the jury that they should estimate the matter of the care, attention, and instruction and training which one of his disposition and character "*may be expected to give to his family,*" that is to say, the jury were told

that they should estimate the financial value of these things, according to their various tastes, habits and opinions.

In *Michigan Central R. Co. vs. Vreeland, supra,* the representative was suing for the benefit of the widow alone, and the court among other things, instructed the jury that they should consider in estimating the damage the loss of "care and advice." The Supreme Court remarked that by the instructions given in that case, the jury were left to conjecture and speculation. "They were told to estimate the financial value of such care and advice from their own experiences as men. These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband."

Here the court told the jury to allow for like things that amount which "one of his disposition and character may be expected to give to his family, and thus determine the value of the life." Of course what one of his disposition and character might be "expected" to give to his family, was the amount which was necessarily left to the experience

of the different jurors according to the standard of their various tastes, habits and opinions. There was no evidence in the case showing what such "care and attention" or "instruction and training" might be worth to the widow, or might be worth to one or both of the children, or might be worth to all three conjointly, nor was there any evidence that the wife would be deprived of any care and attention or instruction and training, or that the children had actually been deprived of such advantages. The fitness of the parent and husband in these regards was not put in evidence. Under the record, as shown here, it is impossible to "determine the value of the life," as the jury were told in this instance, without invading the field of conjecture and speculation. The instructions given here come squarely within the interdiction of the decision in the *Vreeland* case. The decision in the *Vreeland* case goes to the point that the pecuniary loss or damage to the wife or children must be measured by some other standard than the mere loss of society, delightful companionship or mere personal attention and association, but that there must be evidence of an actual loss in care, training and education which must be supplied by the services of another for compensation, and that only upon proof of such matters may the court submit such items of loss to

the jury. In the *Didricksen* case, *supra,* the terms used in the instruction were "deprived of his society" and "care and consideration." The court held that the loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this, and that laying out of consideration the indefiniteness of the term "care and consideration" there was not any evidence relating to the subject or from which its pecuniary value might have been estimated.

2. The court did not charge the jury as to the measure of damages that should be allowed on account of the loss to the widow, or as to the measure of damages on account of loss to the children or either of them. The jury were instructed to estimate the loss according to the method pointed out by the court, deduct the personal expenses of the deceased, and then the balance would be the present amount of the verdict. And then further, charged (upon a totally incomprehensible theory) that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority, but did not direct the jury to apportion the damages,

but by plain inference, directed the return of a gross verdict.

Under the act of 1908 (35 Stat. L. 65) no expressed provision was made for apportioning the damage among those for whom the action was brought. Yet in the *Vreeland* and *Didricksen* cases it is plainly intimated that such should have been the course, and in the *McGinnis* case the Supreme Court expressly say:

> "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return."

In the amendment of 1910, (U. S. Comp. Stat. Supp. 1911, p. 1322) it is provided as follows:

> "And in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought."

In the case of *Fogarty vs. Northern Pacific R. Co.,* Vol. 32, No. 7, Advance Sheets, Wash. Dec., page 292, July 30, 1913, the Supreme Court of the State of Washington passed upon the point contained under this title sub-division, commenting upon and following the decisions of the Supreme Court above referred to. In that case the question of damages was submitted substantially as in this case and the jury returned a single sum. Say the court:

> "It was also error to direct the jury to assess the damages in a single sum. The jury might have found, as between the widow and children, that they had not sustained an equal financial loss, or they might have found that one sustained such a loss which the other did not; yet, under the instructions to assess the damages in a single sum, there was no way to indicate the determination of the jury as to the pecuniary loss suffered by each claimed beneficiary."

For the reason that the court did not limit the damages strictly to the financial loss sustained by the wife and children, and for the reason that the court did not direct the jury to apportion the damages, the Supreme Court of the State of Washington

reversed the judgment in the *Fogarty* case and remanded the cause for a new trial.

In concluding this argument, we urge, however, that this case should not be remanded for a new trial, for the reason that the undisputed evidence and uncontradicted facts show an entire absence of liability on the part of the defendant, and therefore the judgment in this cause should be reversed with instructions to dismiss the action; but, in any event, a new trial must be awarded because the verdict as rendered under the instructions of the court cannot be sustained.

Respectfully submitted,

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No. 2301.

In the United States Circuit Court of Appeals for the Ninth Circuit.

COPPER RIVER AND NORTHWESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

Mrs. E. A. REED, as Administratrix of the Estate of J. E. REED, Deceased,

Defendant in Error.

Upon Writ of Error to the United States District Court for Alaska, Third Division.

Brief of Defendant in Error.

MOTION TO STRIKE OUT CERTAIN PORTIONS OF THE TRANSCRIPT OF THE RECORD.

Now comes the defendant in error, and moves the Court to strike out the following portions of the printed record in this case, to wit:

1st: Motion to quash and set aside summons, and service of summons, and return of summons. (R., pp. 6, 7).

2d: Affidavit of R. J. Boryer (R. 7, 8).

3d: Affidavit of S. T. Brightwell (R. 9, 10).

4th: Order denying motion (R. 11).

5th: Motion for change of place of trial and affidavits in support thereof, and *contra* (R. 11, 21).

6th: Motion to make complaint more definite and certain, and order denying said motion (R. 22–24);

for the reason that said papers are not embodied in any bill of exceptions and form no part of the record proper in this case, and are improperly inserted in the transcript.

And for the same reasons and upon the same grounds to strike out the following portions of the printed record, to wit:

1st: Order for special term of court (R. 30–33);

2d: Order directing issuance of special venire (R. 33);

3d: Order directing issuance of special venire (R. 34, 35);

4th: Order excusing trial jurors (R. 36);

5th: Exception to jurors (R. 38–40);

6th: List of jurors summoned (R. 41, 42).

Defendant in error further moves the Court to strike out the following:

1st: Paper entitled "Instructions (requested by defendant)" (R. 349–355);

2d: Motion for directed verdict (R. 355, 356);

3d: Paper entitled "Defendant's exceptions to Court's instructions to jury and formation of jury" (R. 357–364);

4th: Motion for judgment notwithstanding verdict (R. 365–368);

5th: Order denying motion for judgment notwithstanding verdict (R. 369);

6th: Motion for new trial (R. 370–376);

7th: Order denying same (R. 377);

for the reason that said papers are not embodied in any bill of exceptions, or authenticated in any way to make them a part of the record on writ of error, and

such papers have no proper place in the transcript of the record.

And the defendant in error further moves the Court to strike out the paper entitled "Transcript of Testimony, found in the printed record, beginning on page 48, and ending on page 346, on the following grounds, to wit:

That the same is not authenticated as a bill of exceptions as required by law, in that it is not signed and certified to by the Judge of the court below, but is approved, allowed, and settled by order of the Court (R. 347).

ARGUMENT ON MOTION.

The documents appearing in the transcript, pages 6 to 24, pages 30 to 42, and pages 349 to 377, do not purport to be a bill of exceptions, are not in any way authenticated by the Judge, and form no part of the record on appeal. It is difficult to see for what purpose plaintiff in error had them incorporated into the transcript, unless it was to increase the costs it hoped to recover.

"The fact that papers not in the judgment-roll are in the transcript, and certified to by the clerk, does not make them any part of the record on appeal, when they are not brought into the record by any bill of exceptions or agreed statement of facts, or in some other way recognized by the rules of practice of the federal court."

Duncan vs. Atchison T. & S. F. R. Co., 72 Fed. 808.

The "Transcript of Testimony" which purports to contain also instructions to the jury (R. 48 to 346), is

followed by an "Order allowing, certifying, and settling bill of exceptions" (R. 346, 347). This is followed by another paper, separately entitled in the cause, and entitled "Court's Certificate to Bill of Exceptions."

The "Transcript of Testimony," and the order and certificate, were separately indorsed and separately filed (R. 48 and 348). The first document is not signed by the Judge. The second and third documents appear in the transcript twice, once at pages 346, 347, and again at pages 473–475. It was apparently intended, by having them inserted in the transcript the second time, to authenticate everything not authenticated by the first insertion. In other words, that by having this order and certificate inserted in the transcript, whatever preceded them became thereby a bill of exceptions.

"The signature of the Judge to the order (approving bill of exceptions) did not constitute a signature to the bill of exception," is the decision of this Court in Dalton vs. Hazelett, 182 Fed., at p. 568.

This record is in substantially the same as, but if anything more objectionable condition, than the record in cause No. 2299, Copper River & N. W. Ry. Co. et al. vs. Reeder.

THE CASE MADE BY THE RECORD.

There are fifty-one assignments of error in the transcript, covering forty-one printed pages. Of these the first seven, Nos. 9, 10, 11, 15, 16, 17, 18, 20, 21, 22 and 23, are waived in the brief. The remaining thirty-three assignments are grouped under eight heads and it is contended that eight different ques-

tions of law are raised by the assignments on the record. As a matter of fact, there is not a single one of the questions discussed in the brief of plaintiffs in error that is raised on the record so as to be entitled to review in this court. Most of the questions sought to be raised were never presented to the Court below, and are suggested for the first time in this court.

Before taking up the several contentions of the plaintiff in error, made in the brief, it will be useful, we believe, to examine, in some detail, the assignments of error, in relation to the record upon which they purport to be based.

Assignments of error Nos. 8 to 19, inclusive (Brief of Plaintiff in Error, pp. 19–25), relate to the admission and exclusion of certain evidence. We object to the consideration of these assignments, for the reason that the evidence is not brought into the record by bill of exceptions.

If, however, the Court should overrule the decision in Dalton vs. Hazelett, *supra,* and consider the assignments, then we maintain there was no error in the ruling of the Court. The evidence admitted over the general objections of the defendant tended to show that the train crew, at the time of the wreck, had been worked in violation of the sixteen-hour law, which contributed to the fatality, and was raised by the answer setting up assumed risk, and denied by the reply. Defendant did not object that this violation of the law was not specifically set up in the reply. The opening statement of plaintiff's counsel *did* refer specifically to this matter (R. 59), and the Court called Mr. Boryer's attention to it. Mr. Boryer did

not object that the issue was improperly raised, or that he was surprised and not prepared to meet it. On the contrary, he stated: "I understand the statute, but I desire to make the objection," and the Court replied: "If that is all you have to say about the objection, it will be overruled and exception allowed."

Defendant met this issue by admitting the fact, and offering to show that the men willingly worked overtime—which evidence the Court, of course, excluded. This evidence so offered is referred to in assignments 13, 14 and 19.

Assignments Nos. 25 to 34, inclusive, complain of certain instructions.

If the paper entitled, "Transcript of Testimony, etc." (R. 48–346), is not a bill of exceptions, then there are no instructions in the record. If that paper is to be considered a bill of exceptions, then there are no exceptions to the instructions. In any event these assignments cannot be considered.

2 Enc. U. S. Sup. Ct. Rep. 83.

Assignments Nos. 35 to 49, inclusive, complain of the alleged refusal of the Court to give certain instructions. But these instructions are not even in the paper called "Transcript of Testimony, etc." There is in the transcript a paper entitled "Instructions (Requested by Defendant)" (R. 349–355), containing fifteen paragraphs, each followed by the word "(refused)." But there is nothing to show that these instructions were ever presented to the Court before the jury retired, or at all, or that the Court was ever asked to give them.

"Instructions printed in a transcript on appeal as

having been given, or asked and refused on the trial, but which are not contained in any bill of exceptions, or in any manner authenticated by the trial judge, do not constitute a part of the record in the case."

Sternenberg vs. Mailhos, 99 Fed. 43.

The fiftieth assignment complains of the refusal of the Court to enter judgment for defendant *non obstante veredicto.* It is manifestly frivolous; especially in view of the recent ruling of the Supreme Court in Slocum vs. Insurance Co., 228 U. S. 364.

The fifty-first and last assignment complains of the denial of defendant's motion for a new trial. By repeated decisions of the Federal Courts, this question cannot be considered on a writ of error.

We have thus gone through all the assignments of error, except the twenty-fourth, which we will notice later, and find there is not a single question raised by them *on the record;* and certainly none of the questions so ably and ingeniously argued by counsel in their brief.

The twenty-fourth assignment complains of the action of the Court in denying the motion of the defendant for a directed verdict. If the paper entitled "Transcript of Testimony, etc.," cannot be considered a bill of exceptions, then the motion and evidence is not in the record. If it is to be considered a bill of exceptions, then it perhaps raises the question as to whether there was any evidence from which the jury could legally find for the plaintiff.

Both in the motion (R. 329, 330) and in the argument in their brief, the learned counsel for plaintiff in error overlook or ignore much important evidence.

Their argument is largely based upon the assumptions—

1st. That the proximate cause of the injury was the cleaning of the ashes on the bridge by Albright, the fireman of the rotary.

2d. That the act of Albright was the act of Reed, the engineer, who, it is claimed, had absolute control over his fireman.

In the first place, there was evidence tending to show that Albright extinguished the fire in his ashes, and that the bridge was burned by cinders negligently dropped from some one of the other three engines, or that the proximate cause of the accident was the negligence of the brakeman on the last car in not seeing the fire, or of the section gang who were on the ground presumably to look after the bridge. In the second place, a fireman and engineer are fellow-servants. And the evidence tended to show that the engineer of a rotary has no control or supervision whatever over his fireman—they are in different compartments, and work independently. (Testimony of Townsend, R. 286, 287, 290, 291; Testimony of Wilson, R. 324, 325.)

The jury might also well have concluded that the proximate cause of the fatal accident was the negligence of Holden, the rotary pilot, in not seeing the burning bridge before running into it, caused by his overworked and exhausted condition. Without going into the evidence in greater detail, we think it beyond question that the case was one for the jury.

This, it seems to us, disposes of all the contentions of the plaintiff in error.

There are two questions, however, argued so strenuously by the learned counsel for plaintiff in error, that we deem it proper to notice them a little further. We refer to Points VI and VII (Brief of Plaintiff in Error, page 18).

The sixth point deals with the measure of damages, and is based upon the twenty-eighth assignment of error, where the entire charge on the measure of damages is set out. The particular portion of the charge criticised is that the Court told the jury that they might take into consideration, among other things, "the care and attention, the instruction and training, one of his disposition may be expected to give to his family." These things can be purchased with money, and it would seem that there is a pecuniary loss, and we think the instruction correct.

Conceding that there was error; conceding that there is a bill of exceptions in the record; conceding that the "exceptions" filed May 5th, and not in any pretended bill of exceptions, can be considered,—conceding all this, we say, that this contention should not here prevail, and lead to a reversal of the judgment. For not only did the counsel for defendant fail to except at the time, and thus give the Court an opportunity to omit the phrase from the instruction, but after verdict, and an opportunity to carefully scrutinize the instruction, counsel did not raise the question upon which they now ask for a *reversal* of the judgment. The purported exception to the charge is found on pages 360, 361 of the transcript, and reads as follows: "Defendant excepts to instruction given on page 7 regarding damages, for the

reason that the same is contrary to law and not the proper basis for proving damages in this case." That is all. The point is not even mentioned in the motion for a new trial. Under these circumstances and on this record to reverse the case would be for this Court to set a precedent for astute counsel to waive error, if error there be, by silence on the trial, and on the motion of a new trial, and secure a new trial at a ruinous expense to his adversary, and after lapse of time and dispersion of witnesses, may have rendered a just case hopeless.

The seventh point argued in the brief complains because the verdict did not find separately the amount of damages suffered by the widow and each of the two children. It is asserted that the question is raised by the fifty-first assignment. A careful reading of the assignment, and of that part of the purported record upon which it is based, fail to disclose the slightest reference to the subject. No objection was made to the form of the verdict when it was received. No request was made for such separate findings. It is too late to raise the question here. Counsel cannot try the case on one theory in the court below and on another here. But it is argued the verdict is excessive. If that point were open, it is not well taken. Surely a man earning $3,000 per annum, with a life expectancy of thirty-four years, sober, industrious, and in good health, is worth $20,000.

In conclusion, we respectfully ask that the judgment be affirmed.

J. H. COBB,
Attorney for Defendant in Error.